BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID E. KANODE	)	
Claimant	)	
	)	
VS.	)	
	)	
SPRINT CORPORATION	)	
Respondent	)	Docket No. 1,042,744
	)	
AND	)	
	)	
AMERICAN CASUALTY CO. OF READING, PA.[1]	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the December 19, 2008, Preliminary Decision entered by Administrative Law Judge Marcia L. Yates Roberts. Mark S. Gunnison, of Overland Park, Kansas, appeared for claimant. Daniel N. Allmayer, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant met his burden of proving that he sustained injuries by an accident that arose out of and in the course of his employment with respondent. The ALJ ordered respondent to provide claimant with temporary total disability compensation and to furnish him with medical treatment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 18, 2008, Preliminary Hearing and the exhibits, the transcript of the deposition of claimant taken December 11, 2008, and the transcript of the deposition

[1] Counsel for respondent, both in its Request for Review of Preliminary Decision and in its January 23, 2009, letter brief to the Board, states that the insurance carrier for Sprint Corporation is Gallagher Bassett Services. However, at the December 18, 2008, preliminary hearing, Judge Yates Roberts announced that the insurance carrier is American Casualty Co. of Reading, PA, which is likewise what the records of the Division of Workers Compensation show was the insurance carrier for respondent on the alleged date of accident.

of Wendy Gish taken December 11, 2008, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues that claimant did not suffer an injury or injuries that arose out of and in the course of his employment. Specifically, respondent argues that this case does not come under the premises exception to the going and coming rule, that the "personal comfort" doctrine does not apply to lunch breaks, that claimant was on a personal errand not connected with his employment, and that the accident was the result of claimant's preexisting physical condition and his refusal to use a cane.

Claimant argues that the ALJ was correct in finding that as claimant's accident occurred on respondent's premises during his lunch break, his injuries are compensable under the premises exception to the going and coming rule. Claimant further maintains that the injury occurred because he was blinded by the sunlight and lost his balance, not because of a preexisting medical condition, and this case should not be analyzed under the definition of "personal injury" set out in K.S.A. 2008 Supp. 44-508(e).

The issues for the Board's review are:

(1) Did claimant suffer an injury or injuries by an accident that arose out of and in the course of his employment with respondent?

(2) Does this case does come under the premises exception to the going and coming rule?

(3) Does the "personal comfort" doctrine apply to lunch breaks?

(4) Was claimant on a personal errand not connected to his employment?

(5) Was claimant's injury the result of a personal risk or the normal activities of day-to-day living?[2]

FINDINGS OF FACT

Claimant works for respondent as a Technician 3. He testified that he is essentially on the phone and the computer all day. Claimant suffers from diabetes and states that because of the length of his drive in the mornings, by the time he gets to work his ankles

[2] Respondent did not raise this issue before the ALJ. Nevertheless, in the interest of judicial economy, it will be addressed here as part of the issue concerning whether claimant's injury and resulting disability arose out of and in the course of his employment.

are swollen. He, therefore, at times uses a cane. He testified that he rarely used the cane at work other than to get from the parking garage to his office on the fourth floor of Building 6220 on respondent's campus. His supervisor, Patricia Wheaton, however, testified that she observed claimant using the cane about half the time at work when he went to the restroom, went to lunch, or left the building to smoke.

On October 1, 2008, claimant had a lunch engagement with a coworker, Wendy Gish. Ms. Gish did not work on respondent's campus but had made arrangements to work in Building 6220 that afternoon so that she and claimant could go through some boxes of clothing left to them by a deceased coworker and then go to lunch. Ms. Gish had arranged to get to Building 6220 at about 12:30 p.m. Because he is diabetic, at about 11 a.m., claimant left the office and went to the cafeteria and got a bowl of soup. He brought the soup back to his desk and ate the soup while continuing to work.

Sometime around 1 p.m., claimant and Ms. Gish left Building 6220 on their way to the parking garage where claimant had parked his vehicle. Claimant did not take his cane. The boxes of clothing were in the front seat of claimant’s vehicle. Claimant and Ms. Gish had intended to transfer the boxes of clothing to Ms. Gish's vehicle and at some point go through them to decide if they wanted any. They had made no decision as to whether they would go through the clothing before or after they ate lunch, nor had they decided whether they were going to eat lunch on or off respondent's campus.

As they walked out of Building 6220, Ms. Gish remembered that she had forgotten her keys and returned to the building to get them. Claimant decided to walk over to a smoking designated area and smoke a cigarette while waiting for Ms. Gish to return. When Ms. Gish returned after getting her keys, claimant and she joined back together and again started to walk toward the parking garage. As they turned a corner, however, both were blinded by the bright sunlight and were unable to see two steps leading down. Ms. Gish testified that she lost her footing and stumbled, but was able to catch herself before falling. Before she could warn claimant, however, he stepped out, but there was nothing under his foot and he lost his balance and fell. Claimant suffered a fracture to his right leg just below the kneecap, and injuries to his right shoulder. He has had surgery on his leg and his shoulder, and he was hospitalized from October 1 until December 5, 2008. He has not been released to return to work.

Both claimant and Ms. Gish testified that on the date of his accident, claimant had no difficulty walking. Neither his ankles nor his knees were bothering him, and he had no sensation of pain before missing the step. Although Ms. Wheaton testified that claimant struggled when he did not use his cane while walking, she admitted that she was not present when the accident occurred and had no facts to suggest that anything occurred

other than claimant missed a step, lost his balance, and fell. The parties stipulated that claimant's accident occurred on respondent's premises.[3]

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The "going and coming" rule contained in K.S.A. 2008 Supp. 44-508(f) provides in pertinent part:

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[3] P.H. Trans. at 12.

[4] K.S.A. 2008 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[6] *Id.* at 278.

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.

K.S.A. 2008 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[7] In *Thompson*,[8] the Kansas Supreme Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.

But K.S.A. 2008 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[9] Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[10]

In *Rinke*,[11] the Kansas Supreme Court stated:

> Although K.S.A. 44-508(f) generally excludes compensation if an employee is injured on the way to or from work, the statute also includes a "premises" exception to the exclusion: "An employee shall not be construed as being on the

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[7] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

[8] *Thompson* v. *Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[9] *Id*. at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

[10] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, Syl. ¶ 2, 907 P.2d 828 (1995).

[11] *Rinke v. Bank of America*, 282 Kan. 746, 753, 148 P.3d 553 (2006).

> way to assume the duties of employment or having left such duties at a time when the worker is on the *premises* of the employer . . . ." (Emphasis added.)

Generally, injuries that occur during short breaks on the premises of the employer are considered compensable.[12] Breaks benefit both the employer and employee.[13] In circumstances where the employee is taking a break in an area designated or permitted by the employer for such purposes, even if it is not on the employer's premises, there is also a degree of control sufficient to find the accident compensable.[14]

Larson's Workers' Compensation Law § 13.05(4) (2008) states in part:

> The operative principle which should be used to draw the line here is this: If the employer, in all the circumstances, including duration, shortness of the off-premises distance, and limitations on off-premises activity during the interval can be deemed to have retained authority over the employee, the off-premises injury may be found to be within the course of employment.

Larson's Workers' Compensation Law, Ch. 21 (2006) states:

> Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

This general rule clearly recognizes that ministering to personal comfort is conduct that is typically considered an incident of employment. Activities which are an incident of employment are considered to arise "out of" the employment.

In *Hensley*[15], the Kansas Supreme Court categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character. An injury

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[12] *See* Larson's Workers' Compensation Law § 13.05(4) (2006); *Wallace v. Sitel of North America*, No. 242,034, 1999 WL 1008023 (Kan. WCAB Oct. 28, 1999).

[13] *Id.; Jay v. Cessna Aircraft Co.*, No. 1,016,400, 2005 WL 3665488 (Kan. WCAB Dec. 14, 2005); *Vaughn v. City of Wichita*, No. 184,562, 1998 WL 100158 (Kan. WCAB Feb. 17, 1998): and *Longoria v. Wesley Rehabilitation Hospital*, No. 220,24, 1997 WL 377961 (Kan. WCAB June 9, 1997).

[14] See Larson's Workers' Compensation Law § 21.02 (2006); *Riley v. Graphics Systems, Inc.*, No. 237,773, 1998 WL 921346 (Kan. WCAB Dec. 31, 1998).

[15] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

that arises only from a personal condition of the employee, with no other factors as a cause, is not compensable.[16]

K.S.A. 2008 Supp. 44-508(d) states in part:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2008 Supp. 44-508(e) states:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[17] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[18]

ANALYSIS

There is no dispute that claimant's accident and injury occurred on respondent's premises during his lunch break. Respondent acknowledges that all its employees are required to take at least a one-half hour lunch break. Respondent argues that this case is not controlled by the personal comfort doctrine because claimant was on a lunch break as opposed to a shorter type of break. As such, respondent contends that the going and coming rule should apply. However, even under the going and coming rule, there is a

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[16] *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992); *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

[17] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[18] K.S.A. 2008 Supp. 44-555c(k).

premises exception. The factual situation in this case is somewhat analogous to *Rinke*. Ms. Rinke was injured as she was leaving work, walking on a covered walkway leading to the parking lot where her car was located. Because her slip and fall occurred on respondent's premises, the going and coming rule does not preclude claimant from recovering workers compensation benefits. The factual distinction that Ms. Rinke was leaving work for the day whereas the claimant in this case was on his lunch break is immaterial. Both claimants were on their employer's premises when their accidents occurred. This was all that claimant was required to show in order to prove an exception to the going and coming rule.

This Board Member agrees with respondent that leaving work at lunch is generally not within the purview of the personal comfort doctrine. Instead, the going and coming rule is applicable to leaving or returning to work from a lunch break. The fact that claimant's accident occurred on respondent's premises is an exception to the going and coming rule. Should a worker remain on the premises for the lunch break, then the going and coming rule would not apply. Whether the personal comfort doctrine applies will depend upon the circumstances.

Claimant was on his way to the parking lot when he decided to smoke a cigarette while he waited for Ms. Gish to get her keys. He then headed for the closest designated smoking area. He had finished his cigarette and resumed his trip to the parking garage when he fell. The premises exception applies to these facts. The travel to and from lunch, while on respondent's premises, is in the course of employment.

Finally, respondent contends that claimant's injury did not arise out of his employment because walking and being blinded by the sun are activities of day-to-day living. K.S.A. 2008 Supp. 44-508(e) excludes injuries "where it is shown that the employee suffers disability as a result of . . . the normal activities of day-to-day living." Claimant was not injured because he was walking or because he had sun in his eyes. He was injured and suffered disability because he fell down stairs and landed on concrete. Falling down stairs onto concrete is not an activity of day-to-day living. Furthermore, claimant's accident was not the result of a personal risk or an unexplained fall.[19] And because claimant's injury and resulting disability were caused by his accident, they are compensable.

CONCLUSION

Claimant's injuries suffered in a trip and fall on steps on respondent's premises during his break is compensable as an accident which arose out of and in the course of his employment with respondent.

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[19] *McCready v. Payless Shoesource*, __ Kan. App. 2d __, 200 P.3d 479 (2009); *Guhr v. Menonite Bethesda Society, Inc., d/b/a Bethesda Home*, Docket No. 210,727, 1997 WL 803442 (Kan. WCAB Dec. 19, 1997).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Marcia L. Yates Roberts dated December 19, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2009.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Mark S. Gunnison, Attorney for Claimant
Daniel N. Allmayer, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge